No. 16478

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DONALD W. FORMHALS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On July 2, 1958, the Federal Grand Jury in and for the Southern District of California indicted the appellant in three counts for embezzling letters which had been intrusted to him and which had come into his possession intended to be conveyed by mail, in violation of Title 18, U. S. C., Section 1709 [C. Tr. 3].[1]

Upon arraignment and a plea of not guilty appellant was tried by jury and convicted of each count of the indictment on February 19, 1959 [C. Tr. 7].

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[1]C. Tr. refers to the Clerk's Transcript of Record.

The sentence was imposed by the Court on March 9, 1959 [C. Tr. 8], under which the appellant was committed to the custody of the Attorney General for a period of six months on each count of the indictment, to run concurrently [C. Tr. 9].

The jurisdiction of the District Court is predicated upon Title 18, U. S. C., Section 3231, and Title 18, U. S. C., Section 1709. Jurisdiction of this Court rests pursuant to Title 28, U. S. C., Sections 1291 and 1294.

II.
STATUTES INVOLVED.

The indictment in this case was brought under Title 18, U. S. C., Section 1709, which provides in pertinent part as follows:

> "Whoever, being a . . . Postal Service employee, embezzles any letter, . . . intrusted to him or which comes into his possession intended to be conveyed by mail . . . shall be fined not more than $2,000 or imprisoned not more than five years, or both."

III.
STATEMENT OF THE CASE AND FACTS.

The appellant's Statement of the Case and Statement of the Facts are not controverted and are incorporated herein by reference.

Where deemed necessary, a further development of the facts will be made in conjunction with the argument of the particular specification of error.

IV.
ARGUMENT.

SPECIFICATION I.

The District Court Did Not Commit Error by Failing to Make a Determination as to Appellant's Competency to Stand Trial.

On August 12, 1958, the appellee, in conjunction with counsel for the appellant, presented an oral motion to the District Court requesting that a psychiatrist be appointed to examine the appellant [C. Tr. 6]. Said motion was granted. However, an order appointing a psychiatrist was not executed by the Court until February 4, 1959, due to the hospitalization of the appellant during the intervening period [C. Tr. 72, 73]. The order of February 4, 1959, directed that Dr. Edwin E. McNeil, a psychiatrist, examine the appellant on or before February 13, 1959, and submit a written report of his examination to the Court, with copies thereof to the respective attorneys for the appellant and appellee. The order further directed Dr. McNiel to make inquiry into the present competency of the defendant with specific reference to his ability to presently defend himself, or to assist his counsel in the preparation and presentation of his defense,[1] and, as to defendant's mental condition at the time of the commission of the alleged defense.[2] Subsequent thereto, on February 19, 1959, the District Court ordered the report of Dr. McNiel filed [C. Tr. 22].

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[1]Pursuant to Title 18 U. S. C. Section 4244.

[2]Pursuant to Rule 28 of the Federal Rules of Criminal Procedure.

The appellee admits that no judicial determination was made of the competency of the appellant to stand trial. It is submitted, however, that in view of the conclusion Dr. McNiel, ". . . it is my opinion that he is able to presently defend himself and assist his counsel in the preparation and presentation of his defense . . .", that the appellant had no right to a hearing or a judicial determination of his present competency to stand trial.

Title 18, U. S. C., Section 4244, provides in pertinent part that ". . . if the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the Court shall hold a hearing, . . ." Conspicuously absent from the statute is any requirement for a hearing, or for a judicial determination, following a report by the examining psychiatrist that the accused is presently competent to stand trial.

The only decision found dealing specifically with the point in question is *Markham v. United States,* 184 F. 2d 512 (4th Cir., 1950). In a *per curiam* decision the Court stated:

> "[1, 2] It appears that on November 9, 1949, counsel for appellant moved that he be committed to an institution to be examined by competent psychiatrists for the purpose of determining his sanity. The United States Attorney joined in the motion and an order to that effect was accordingly entered. Appellant was committed to Saint Elizabeth's Hospital, Washington, D. C. for examination and the period of examination was extended at the suggestion of the superintendent of that institution in order that a thorough examination might be had. After an examination extending from November 14, 1949 to

January 26, 1950, the superintendent of Saint Elizabeth's and another psychiatrist joined in a report finding that appellant was not insane at the time and was competent to consult with counsel in the preparation of his defense. Since it did not appear from the report of the psychiatrists that appellant was insane, it was not required by the statute that the court hold a hearing as to his mental condition at the time. Nevertheless, the trial judge made inquiry whether appellant desired a further hearing in the matter, and, being advised by his counsel that he did not, proceeded to find as a fact that appellant was competent to stand trial. It is true that appellant and his counsel thereafter stated in open court that they waived a hearing on insanity at that time; but this was a mere matter of supererogation. No such waiver was required to enable the court to proceed with the arraignment and trial after the examining physicians had reported appellant sane, especially as the court had been advised that no further hearing was desired on the matter and had made a finding of sanity based on their report.

"There was no error and the judgment and sentence appealed from will be affirmed.

"Affirmed."

By way of *obiter dictum, Krupnicka v. United States,* 254 F. 2d 213 (8th Cir., 1959), stated:

". . . the fact that a situation may be one imposing the duty upon the Court to have a psychiatric examination made does not necessarily mean, however, that the Court is likewise compelled to hold a hearing and make a finding as to the accused's mental competency. The language of Section 4244 as to the

> requirement for a hearing is that, 'if the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused (as to be unable to understand the proceedings against him or properly to assist in his own defense), the Court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and made a finding with respect thereto' ".

Again, by way of *obiter dictum* in *United States v. Everett,* 146 Fed. Supp. 54 (D. C. Kan., 1956), stated,

> "the only hearing contemplated as to a defendant's mental competency, other than a full and complete hearing at the trial of the criminal action, is if the report of the psychiatrist 'indicates a state of present insanity or . . . mental incompetency . . .', then a hearing is to be had as provided in the act. . . . The legislation, in the studied judgment of this Court, should be applied precisely as written."

The appellant, in attempting to read into the statute a requirement for a hearing where the accused is found competent by the examining psychiatrist, cites the case of *Gunther v. United States,* 215 F. 2d 493 (District of Columbia Cir., 1954). The specific holding of the *Gunther* decision is that where the accused had been committed to a mental hospital as being mentally incompetent to stand trial, the District Court subsequently erred in trying the accused after the superintendent of the mental hospital had issued a certificate that the accused had recovered his reason, without the District Court making a judicial determination of the present competency of the accused to stand trial. Circuit Judge Bazelon specifically noted in footnote No. 9, "such a hearing is required by the

statute only where there has been a psychiatric finding of present incompetency." Thus the *Gunther* case engrafted upon the statute the requirement that a judicial determination must be made that the accused had regained his competency to stand trial subsequent to an earlier judicial determination that the accused was not competent to stand trial. This extension of the statutory rule has been approved in *Contee v. United States,* 215 F. 2d 324 (1954), and *Taylor v. United States,* 222 F. 2d 398 (1955).

The appellant also cites the case of *Watson v. United States,* 234 F. 2d 42 (District of Columbia Cir., 1956). The *Watson* decision reversed a conviction of murder upon the grounds that illegally obtained evidence had been used by the prosecution to acquire the conviction. Watson had been examined by a psychiatrist subsequent to his arrest and found competent to stand trial. However, no judicial determination of his competency to stand trial had been made. By way of *obiter dictum* Circuit Judge Danaher stated "Still, on a new trial, there should be a determination of the competency, to be noted of record, pursuant to the statute", citing the *Gunther* decision alone as authority for that proposition. It is submitted that Judge Danaher overlooked footnote No. 9 to the *Gunther* decision.

It should be noted that appellant questions the failure of the Court to make a determination of his competency to stand trial for the first time at the appellate level. Even, assuming *arguendo,* that error had been committed of sufficient seriousness to invoke the "plain error" rule set forth in Rule 52 of the Federal Rules of Criminal Procedure, the appellant should not be entitled to a reversal of his conviction. The remedy invoked in the *Gunther*

decision was to remand the case to the District Court with directions to determine, in a hearing, whether the appellant was competent to stand trial when he was tried and sentenced. And, if found to have been incompetent, to vacate the conviction and order a new trial, otherwise, the conviction was to stand. It should also be noted that Title 18, U. S. C., Section 4245, entitled, "Mental incompetency undisclosed at trial",[3] provides for an administrative remedy which disturbs the conviction only in the event the appellant is found to have been incompetent to stand trial.

It has also been established that Title 28, U. S. C., Section 2255 is available to test the question of the appellant's competency to stand trial.

Smith v. United States, 259 F. 2d 125 (9th Cir., 1958);

Smith v. United States, 267 F. 2d 210 (9th Cir., 1959).

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[3]"§4245. Mental incompentency disclosed at trial.

"Whenever the Director of the Bureau of Prisons shall certify that a person convicted of an offense against the United States has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that there is probable cause to believe that such person was mentally incompentent at the time of his trial, provided the issue of mental compentency was not raised and determined before or during said trial, the Attorney General shall transmit the report of the board of examiners and the certificate of the Director of the Bureau of Prisons to the clerk of the district court wherein the conviction was had. Whereupon the court shall hold a hearing to determine the mental competency of the accused in accordance with the provisions of section 4244 above, and with all the powers therein granted. In such hearing the certificate of the Director of the Bureau of Prisons shall be prima facie evidence of the facts and conclusions certified therein. If the court shall find that the accused was mentally incompetent at the time of his trial, the court shall vacate the judgment of conviction and grant a new trial. Added Sept. 7, 1949, c. 535, §1, 63 Stat. 686."

SPECIFICATION II.

The District Court Did Not Err in Failing to Admonish the Jury to Disregard the Evidence Offered by the Prosecution in Regard to a "Statement of Charges."

During cross-examination, the appellant admitted that he had received a "statement of charges" on June 25, 1958 [C. Tr. 94] and that upon receiving it, he did not deny the charges made against him as set forth therein [R. Tr. 93]. It is submitted that being presented with a statement of charges which accuses the recipient of committing a felony could rationally be expected to elicit a denial from an innocent person. The failure so to deny the charges is a matter which can be put before the jury as equivalent to an admission of guilt. Such adoptive admissions have long been recognized as an exception to the rule against hearsay.

Sparf and Hanson v. United States, 156 U. S. 51, 56 (1895);

Egan v. United States, 137 F. 2d 369 (8th Cir., 1943), cert. den. 320 U. S. 788.

The appellant on direct examination had testified that his confession [Ex. 1] was the result of coercion and emotional disturbance [C. Tr. 82-84]. The subsequent admission here complained of, received approximately six hours after signing the confession [C. Tr. 43, 98], appears relevant to impeach the appellant and corroborate the confession. The District Court, however, sustained the appellant's objection to the admission into evidence of the "statement of charges". It is submitted that the evidence could properly have been received into evidence and that therefore no prejudice resulted to the appellant

by the failure of the Court, *sua sponte,* to admonish the jury to disregard the matter.

Further, the fact that the appellant did not request the Court to admonish the jury to disregard the matter [C. Tr. 97] precludes the matter from being considered for the first time on appeal, unless it can be said that "plain error" resulted.

Crutchfield v. United States, 142 F. 2d 170 (9th Cir., 1943);

Hill v. United States, 261 F. 2d 483 (9th Cir., 1958);

York v. United States, 241 Fed. 659 (9th Cir., 1916);

Federal Rules of Criminal Procedure, Rule 52.

In view of the eyewitness testimony of postal inspector Williard W. Lynch [C. Tr. 28-45] and the full and complete confession of the appellant [Ex. 1], the prejudicial effects, if any, of the offer of the "statement of charges" would appear to fall far short of "plain error."

SPECIFICATION III.

The District Court Did Not Err in Limiting the Cross-Examination of the Prosecution Witness Norman H. Wilson Relating to the Physical State of the Appellant.

It is asserted that the District Court committed reversible error by limiting the cross-examination of the prosecution witness Norman H. Wilson relating to the appellant's "physical state." A reading of the testimony of Mr. Wilson on direct examination [C. Tr. 24-26] will suffice to show that the physical state of the appellant was beyond the scope of the direct examination and thus,

under the Federal Rule, not a proper subject for cross-examination.

Chevillard v. United States, 155 F. 2d 929 (9th Cir., 1946);

Aplin v. United States, 41 F. 2d 495 (9th Cir., 1930);

United States v. Minuse, 142 F. 2d 388, 389 (2d Cir., 1944).

Where the appellant wishes to develop defensive matters from a prosecution witness he should call that witness as his own, unless the matter has been covered during the direct examination.

Bridgman v. United States, 183 F. 2d 750, 758 (9th Cir., 1950).

". . . the idea that lies at the bottom of all cross-examination [is] . . . that it is designed, not only to develop the facts of the case, but to test the witness in matters of recollection, of prejudice or bias, and of truthful statement."

United States v. Fontana, 231 F. 2d 807, 811 (3rd Cir., 1956), citing *United States v. Asgill,* 602 F. 2d 776, 779 (4tht Cir., 1932).

It is submitted that the District Court did not err in refusing to allow the appellant to develop defensive matters from a prosecution witness in that the matter was beyond the scope of direct examination, and that, as the appellant did not avail himself of the opportunity to call Mr. Wilson as his own witness, no error can be assigned to the District Court's limitation of the cross-examination of Mr. Wilson.

SPECIFICATION IV.

The District Court Committed No Error in Failing to Give the Instruction That the Appellant's Testimony Is to Be Considered the Same as That of Any Other Witness.

Appellant cites: "The law neither does nor requires idle acts."

Cal. Civ. Code, Sec. 3532.

This section unquestionably states an admirable principle of law. It is submitted, however, that this maxim, relied upon by the appellant, in no way derogates the requirement of Rule 30 of the Federal Rules of Criminal Procedure that "No party may assign as error any portion of the charge or omission therefrom, unless *he* objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection" (emphasis supplied). The record discloses no compliance with the stated rule by the appellant [C. Tr. 105-106].

The case of *People v. Ridgway,* 89 Cal. App. 615, 265 Pac. 349, relied upon by the appellant, does state that the subject instruction is correct in law, but also states that no error should result from a refusal of the court to give the instruction.

In the case of *Pine v. United States,* 135 F. 2d 353 (5th Cir., 1943), cert. den., 320 U. S. 740, the following test was set forth:

> "In short, the refusal as to any of them may be regarded as reversible error if, but only if, (1) it is in itself a correct charge, (2) it is not substantially covered in the main charge, and (3) it is on

such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation."

While the subject instruction meets the first requirement,

Raffel v. United States, 271 U. S. 189 (1943);
Caminetti v. United States, 242 U. S. 470 (1917),

the instruction given by the court [C. Tr. 104-105] sufficiently instructed the jury in regard to the credibility of witnesses so as to defeat the second requirement of the *Pine* case. In respect to the third requirement of the *Pine* case, the appellant has not pointed out wherein the failure to give the subject instruction deprived the defendant of his defense or worked to his prejudice. Thus, the appellant does not show himself to be entitled to the requested relief.

SPECIFICATION V.

The Evidence Supports the Finding That the Letters Appellant Is Charged With Embezzling Had Been Placed in the United States Mails.

Apart from the questioned testimony of Mr. Lynch, the following testimony supports the finding of the jury that the letters appellant is charged with embezzling had been placed in the United States mail for delivery: The appellant admitted that he was engaged in the sorting of mail at the Hemet, California, Post Office [C. Tr. 75], and that he took a handful of mail into the men's room of the post office [C. Tr. 76]. The letters were being processed through a United States post office [C. Tr. 24-26, 33-35]. They bear post marks and stamp cancellations [Exs. 2A through 2F].

It is submitted that, in the absence of contradicting evidence, the jury was entitled to infer from all the above that the letters in question had been placed for delivery in the United States mail.

Further, appellant is not entitled to question the sufficiency of the evidence in this court, having provided this court with only a partial transcript of the proceedings below. It is well settled that to challenge the sufficiency of the evidence on appeal the entire record must be before the Appellate Court.

Chevillard v. United States, 155 F. 2d 929, 936 (9th Cir., 1946).

Without the entire record the Appellate Court is entitled to assume that the evidence is sufficient to sustain conviction.

Hagner v. United States, 285 U. S. 427 (1932).

Further, appellant is not entitled to challenge the sufficiency of the evidence in that he failed to make any motion for a judgment of acquittal as provided for by Rule 29 of the Federal Rules of Criminal Procedure. It is well settled that this failure will preclude a review of the sufficiency of the evidence by an Appeal Court.

Mosca v. United States, 174 F. 2d 448, 451 (9th Cir., 1949).

It should also be noted that this specification of error, as others discussed earlier herein, is asserted for the first time at the appellate level, and therefore is not grounds for appellate relief.

SPECIFICATION. VI.

The District Court Did Not Err in Allowing Postal Inspector Willard W. Lynch to Testify as an Expert on Postal Procedure.

Appellant contends that Postal Inspector Lynch was not qualified to testify as an expert on postal procedures. The District Court concluded that Mr. Lynch was so qualified. Mr. Lynch had testified that he had been a postal employee for 22 years and a postal inspector for 11 years [C. Tr. 29], and that he was charged with the duty of investigating losses of mail at the Hemet, California, post office [C. Tr. 29, 30].

The qualifications of an expert witness is a matter for the trial judge's discretion, reversible only for abuse.

Tuchey v. Loew's Theater and Realty Corp., 149 F. 2d 677, 679 (2d Cir., 1945);

Cohen v. Traveler's Insurance Co., 134 F. 2d 378 (7th Cir., 1943).

It is submitted that no abuse of discretion was committed by the District Court in allowing Mr. Lynch to state an opinion based upon his particular knowledge as a postal inspector. The statement of Mr. Lynch that, "I can't say exactly at Hemet. They should not have been" [C. Tr. 104] goes to the question of the weight to be given his testimony rather than his qualification as an expert on postal procedures.

Although appellant cites a correct rule of law: "A witness' conclusion should not be admitted in evidence if facts underlying it may be *easily* stated so as to reproduce to the jury the factual conditions involved" (emphasis supplied) it has doubtful applicability here. It should be noted that the questioned testimony was elicited

during rebuttal examination [R. Tr. 97] pertinent to the testimony of the appellant that he had innocently carried the letters into the men's room [R. Tr. 76]. The facts necessary to entitle the jury to reach a contrary conclusion, stated by Mr. Lynch as an expert, would necessarily have to include a complete explanation of the various postal routes affected, the mail collection procedure, and the mail sorting and distribution procedure at the Hemet, California, post office. Under these circumstances and as a matter of rebuttal, it is submitted that the Court did not abuse its discretion by allowing the "easier" means of proof.

V.
CONCLUSION.

1. A judicial determination of the competency of the appellant to stand trial was not required in the instant case.

2. No error occurred during the attempted introduction into evidence of the "statement of charges" which required the Court to admonish the jury to disregard the matter.

3. The questions relating to the "physical state" of the appellant were defensive matters, beyond the scope of direct examination, and thus properly denied on cross-examination of Norman H. Wilson.

4. The District Court adequately instructed the jury in regard to the credibility of witnesses.

5. The evidence supports the finding that the letters appellant is charged with embezzling had been placed for delivery in the United States mail.

6. The District Court did not abuse its discretion in allowing the Postal Inspector to testify as an expert on postal procedures.

7. Specifications of error I, II, IV and V were not raised in the District Court, and should not be heard for the first time at the appellate level.

Respectfully submitted,

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